

The Honorable Karen A. Overstreet  
Chapter 11  
Stalking Horse/Bid Procedures Hearing Date  
and Time: December 7, 2010 at 9:30 a.m.  
Response Due: December 7, 2010 (time of hearing)

Sale Hearing Date: to be determined  
Sale Hearing Time: to be determined  
Response Due: to be determined  
Hearing Location: 700 Stewart St., Rm. 7206

**UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

In re

FREDERICK D. BERG,

Debtor

Lead Case No. 10-18668-KAO  
(Administratively Consolidated with  
Case Nos. 10-23787-KAO and 10-  
23755-KAO)

In re

OREGON COACHWAYS, INC.  
EIN 93-0839990

Debtor

MOTION FOR APPROVAL OF:

1. SALE, PURSUANT TO AN AUCTION, OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS AND BUSINESS FREE AND CLEAR OF LIENS;
2. BIDDING, NOTICE AND SALE PROCEDURES; and
3. ADDITIONAL RELIEF

In re

MERIDIAN TRANSPORTATION RESOURCES  
(CANADA), LTD.

Debtor

Oregon Coachways, Inc. ("**OCW**") and Meridian Transportation Resources (Canada), Ltd. ("**MTR**"), the Debtors and Debtors In Possession (OCW and MTR collectively, the "**Debtors**"), through their counsel George S. Treperinas and Karr Tuttle Campbell, move the Court for approval of (i) sale of substantially all of OCW' assets and business and MTR's "Sightline Tours of Canada" business free and clear of all liens, claims, interests and encumbrances pursuant to Bankruptcy Code §363; (ii) bidding and notice procedures; (iii) assumption and assignment of certain of Debtors'

MOTION FOR APPROVAL OF: 1. SALE...OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS ...FREE AND CLEAR OF LIENS; 2. BIDDING, NOTICE AND SALE PROCEDURES; and 3. ADDITIONAL RELIEF - 1

#777963 v1/ 43836-001

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1 executory contracts; (iv) rejection and assumption of certain of Debtors' contracts; and (iii)  
2 additional relief as described herein. This motion (the "***Sale Motion***") is supported by the  
3 Declarations of Diana K. Carey (the "***Carey Declaration***") and Eric D. Orse (the "***Orse***  
4 ***Declaration***").

## 6 **I. FACTUAL BACKGROUND**

7 1. Frederick Darren Berg, the sole-shareholder of both of the Debtors, filed a voluntary  
8 petition under Chapter 11 of the United States Bankruptcy Code (the "***Code***") in the United States  
9 Bankruptcy Court for the Western District of Washington at Seattle (the "***Bankruptcy Court***") on  
10 July 27, 2010 under the Lead Bankruptcy Case No. 10-10528-KAO (the "***Berg Case***").

12 2. Diana K. Carey (the "***Trustee***") was appointed Chapter 11 trustee of the Berg Case  
13 on August 19, 2010, and a Bankruptcy Court order was entered thereafter ratifying her control of  
14 the Debtors, which she continues to manage and control.

16 3. Each of the Debtors filed voluntary petitions (collectively, the "***Reorganization***  
17 ***Cases***") under Chapter 11 of the Code, MTR on November 15, 2010<sup>1</sup>, and OCW on November 16,  
18 2010 (the former, with respect to MTR and the latter, with respect to OCW, the "***Petition Date***").

20 4. OCW operates a premium motor coach fleets for charter primarily in the state of  
21 Oregon and in the western United States. MTR and OCW have common ownership but operate  
22 semi-autonomously. MTR together with other affiliated companies operate a motor coach charter  
23 enterprise called "MTR Western." However, MTR also operates a side-line business operation called  
24 Sightline Tours of Canada which operation is the only portion of MTR assets proposed for sale  
25 hereunder.  
26

27  
28 <sup>1</sup> MTR, has also sought and obtained an Order of recognition of its US bankruptcy case in the Supreme Court of British Columbia, Vancouver  
Registry, in Bankruptcy and Insolvency under case no. S-107609 on November 19, 2010.

1           5.     The Debtors continue to operate as debtors-in-possession pursuant to sections  
2 1107(a) and 1108 of the Code. No trustee or examiner has yet been appointed in the Reorganization  
3 Cases, although a motion to appoint the Trustee as the trustee of each of the Debtors is pending for  
4 hearing on December 7, 2010.  
5

6           6.     Prior to Berg's bankruptcy filing, Berg engaged in various activities that were  
7 detrimental to the continued success of the Debtors and their businesses, which activities have been  
8 well documented in the Berg Case and the related "*Meridian Fund Cases*."  
9

10          7.     In order to maximize the value of the assets of the Berg bankruptcy estate, the Trustee  
11 has sought to maintain the going-concern value of the Debtors' businesses. The Trustee has obtained  
12 offers from numerous parties for the Debtors' businesses and believes that the best prospect for  
13 successfully selling such assets is through bankruptcy process as proposed in this Motion.  
14

15          8.     The primary assets of OCW are the motor coaches (the "*Motor Coaches*").

16          9.     OCW remains indebted to Commerce Bank of Washington N.A. ("*Commerce*"), as a  
17 result of a loan to Berg in January 2010, whereby Berg gave a blanket security interest over OCW  
18 assets, as well as titles to 12 OCW Motor Coaches as additional security. As of October 7, 2010, the  
19 loan indebtedness was \$631,403.14 (comprised of \$577,078.23 in principal, accrued interest of  
20 \$10,700.17, and costs and expenses of \$43,624.74). Commerce has agreed to allow OCW to use its  
21 cash collateral as part of its recent bankruptcy filing and an order authorizing this has been entered on  
22 an interim basis.  
23  
24

25          10.    A prompt sale of the assets is required in order to maintain the going concern value of  
26 the Debtors and their businesses, for the benefit of their creditors, employees, and customers.  
27  
28

1 11. These bankruptcy filings were the only sure way to protect and perhaps even increase  
2 the value of the Debtors' businesses. Without filing for bankruptcy, it is unlikely that the Debtors  
3 could have survived without having to terminate all employees and close the business enterprise  
4 entirely.  
5

6 12. **Marketing Efforts.** Since appointment of the Trustee, the Debtors' management  
7 team, as well as the Trustee and her financial advisor, Eric Orse ("***Orse***"), have worked exhaustively  
8 to identify and contact potential buyers, and to reassure customers and vendors that the OCW brand  
9 and related business enterprise will survive the challenges which came to light in conjunction with  
10 Berg's actions and inactions relating to the Meridian Funds and OCW, as well as after the  
11 bankruptcy filing. 2 interested parties were provided with a confidentiality and non-disclosure  
12 agreement ("***NDA***") and given a promotional package and access to further data about the Debtors.  
13  
14

15 13. The Trustee and Orse have been engaged in discussions with TMS West Coast, Inc.,  
16 ("***Buyer***") since a short time after the Trustee's appointment in the Berg Case and eventually  
17 reached agreement on the terms of an Asset Purchase Agreement (the "***APA***"), attached as Exhibit  
18 A. The APA provides that consideration for the Acquired Assets is cash at Closing to Debtors of  
19 \$2,750,000 (the "***Purchase Price***").  
20

21 14. Based on the Trustee's prepetition sale efforts, and contacts with potentially  
22 interested parties, the Trustee believes that the Purchase Price is fair and reasonable and is the  
23 highest and best offer received to date. In order to be in a position to sell OCW as a going concern,  
24 it was necessary to obtain authority to use cash collateral of Commerce for its operations, which  
25 Commerce has been willing to agree to, upon the terms contained in the Cash Collateral Order [Dkt  
26  
27  
28

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<sup>2</sup> The Meridian Fund cases have been consolidated for administration under Case No. 10-17952 in the above-  
*Law Offices*

#247] (and a hearing to consider approval of this use of cash collateral on more than an interim basis is scheduled to be heard on December 7, 2010). Current financial and cash flow issues dictate that a sale be consummated quickly to ensure the value of the Debtors' assets is preserved. Indeed, absent an expeditious sale or an immediate substantial increase in off-season business, the value of the Debtors as a going concern will be placed in severe jeopardy and the Debtors may well be forced to liquidate.

## **II. SUMMARY OF TERMS OF PROPOSED SALE**

The following is a summary of some of the material terms of the proposed sale ("***Proposed Asset Sale***") as set forth in the APA:<sup>3</sup>

1. **Assets to be Purchased.** The assets to be purchased (the "***Acquired Assets***") include substantially all of OCW's assets and MTR's "Sightline Tours of Canada" business including without limitation all of their rights, title, privileges, benefits and interests in and to:

(a) **Inventory.** All inventories of parts or other equipment, which are used or held for use by OCW or MTR with respect to the Sightline Tours Property, together with all rights of Seller Entities against suppliers of such inventories (the "***Inventory***");

(b) **Tangible Personal Property.** All furniture, fixtures, equipment, parts, machinery and other tangible personal property (other than Inventory) of OCW or MTR with respect to the Sightline Tours Property, including the tangible personal property such as all computers and software, and personal property related thereto, including all computer racks, cables and racks listed on **Schedule 2.1(b)** (the "***Tangible Personal Property***");

(c) **Personal Property Leases.** The leases or subleases of Tangible Personal Property as to which OCW or MTR with respect to the Sightline Tours Property is the lessee or sublessee, together with any options to purchase the underlying property (the leases and subleases are

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captioned Court.

<sup>3</sup> This description of the terms of the APA is intended solely to provide the Court and interested parties with an overview of the significant terms the APA. The Court and interested parties are respectfully referred to the APA for the complete terms of the Proposed Asset Sale. In the event of a conflict between the terms included in this overview and the APA contained herein and the APA, the APA shall govern. Capitalized terms not defined in this Motion have the meanings given in the APA.

collectively referred to herein as the “**Personal Property Leases**”), but only if such leases or subleases are designated by Purchaser as Assumed Executory Contracts;

(d) Client List. OCW or MTR with respect to the Sightline Tours Property current and prospective Customer lists;

(e) Intangible Personal Property. All Intellectual Property of OCW or MTR with respect to the Sightline Tours Property (including Seller Entities’ goodwill therein) and all warranties, rights, privileges, claims, causes of action and options relating or pertaining to the Acquired Assets or the Seller Entities’ Business, including the name “OC&W”, the business processes and practices of Seller Entities, together with any Intellectual Property which would be considered an Assumed Executory Contract;

(f) Permits. All licenses, permits, certificates, authorizations and approvals issued by any Governmental Authority, including applications therefor (collectively, “**Permits**”);

(g) Books and Records. All books and records used or held for use in the conduct of the Seller Entities’ Business or otherwise relating to the Acquired Assets, other than the minute books, charter documents, stock transfer books and records, and corporate seal of Seller Entities;

(h) Deposits. All prepaid assets and deposits, security deposits, deposits with creditors and other deposits of any kind whatsoever;

(i) Contracts. All Existing Contracts which are designated by Purchaser as Assumed Executory Contracts;

(j) Real Property Leases. The leases of real property as to which OCW or MTR with respect to the Sightline Tours Property is the lessee (collectively the “**Office Lease**”); but only if such leases are designated by Purchaser as Assumed Executory Contracts;

(k) Motor Coaches. The motor vehicles identified on Schedule 2.1(l) owned by OCW. Schedule 2.1(l) shall identify, among other things, the asset number, type, make, model, year, state of registration, and the vehicle identification number of each motor vehicle owned by OCW; and

(l) Other Assets. The assets set forth on Schedule 2.1(m).

2. **Consideration**. The purchase price for the Acquired Assets shall consist of the Purchase Price, described above.

3. **Assumed Executory Contracts**. Pursuant to Section 2.2 of the APA, within 10 days of execution of the APA the Buyer shall provide Debtors with written notice of which Existing Contracts it intends to assume as Assumed Executory Contracts at Closing. Upon receipt of Buyer’s

1 written disclosure of the Assumed Executory Contracts, Debtors shall file a motion that such  
2 contracts be assumed and assigned by order of the Court on the date that the Court approves a final  
3 sale of the Acquired Assets to the Buyer. Any such order assuming the Assumed Executory  
4 Contracts shall be conditioned upon Closing of the sale to a Successful Bidder desiring an  
5 assignment of the Assumed Executory Contracts.  
6

7       4.     **Cure Costs.** As described in Section 2.2(a) of the APA, the amount determined to  
8 be necessary to cure the Debtors' pre-Closing obligations shall be paid at closing in order to allow  
9 the Assumed Executory Contracts to be assigned to the Buyer. If the Debtors do not have the  
10 ability to pay the Cure Amounts, the Buyer has the right to pay the Cure Amounts and deduct the  
11 amount of such payment(s) from the Purchase Price.  
12

13       5.     **Rejection of Contracts.** With respect to any Existing Contracts which are not  
14 Assumed Executory Contracts (the "***Excluded Contracts***") which the Buyer informs the Debtors in  
15 writing it requires be rejected as a condition of the sale no later than 10 days after execution of the  
16 APA, Debtors shall file a motion for rejection of such contracts that such contracts be rejected by  
17 order of the Court on the date that the Court approves a final sale of the Acquired Assets to the  
18 Buyer. Any such order rejecting Excluded Contracts shall be conditioned upon Closing of the sale  
19 to a Successful Bidder desiring the rejection of the Excluded Contracts.  
20  
21

22       6.     **Conditions.** Debtors and Buyer's obligations to consummate the transactions  
23 contemplated in the APA are subject to satisfaction of the conditions set forth in Articles VII and  
24 VIII of the APA, respectively. Consummation of the sale under the APA is conditioned upon, *inter*  
25 *alia*, entry of the Bidding Procedures Order (being filed concurrently herewith) and Sale Order, as  
26 defined below in Section III. and attached hereto as Exhibit B.  
27  
28

1           7.     **Higher and Better Offers.** The APA is subject to the submission by third parties of  
2 higher or better offers as set forth in the Bidding Procedures Order.

### 3                                   **III. PROPOSED SALE PROCEDURES**

#### 4           **1.     The Bidding Procedures and Break Up Fee**

5           The Debtors and Buyer recognize that the sale of the Acquired Assets as contemplated by  
6 the APA is subject to Debtors' receipt of higher and better offers. Therefore, Debtors seek authority  
7 to implement certain procedures to ensure that their bankruptcy estates will obtain the best return  
8 possible. The Debtors thus request that the Court enter a Bidding Procedures Order in the form  
9 being filed concurrently herewith, approving the following bidding procedures (the "***Bidding***  
10 ***Procedures***") to be employed with respect to the Proposed Asset Sale.

11           The Proposed Asset Sale is subject to competitive bidding as set forth herein and approval by  
12 the Court at a hearing under Sections 363 and 365 of the Bankruptcy Code (the "***Sale Hearing***").  
13 The following alternative bid provisions and related bid protections are designed to compensate  
14 Buyer for its efforts and agreements to date and the concomitant benefits conferred upon Debtors,  
15 and to facilitate a full and fair process designed to maximize the value of the Acquired Assets for the  
16 benefit of Debtors' stakeholders:<sup>4</sup>

#### 17           **2.     Designation of Stalking Horse Bidder.**

- 18           a.     Debtors have designated the bid of Buyer ("***Stalking Horse Bidder***") as the  
19 "stalking horse" bid ("***Stalking Horse Bid***"). As the Stalking Horse Bidder,  
20 Buyer shall, upon entry of the Bidding Procedures Order, be entitled to the  
21 Break-Up Fee (as defined below) and other standard stalking horse  
22 protections as discussed below. **For purposes of these procedures, the**  
23 **Stalking Horse Bidder's deposit requirement is \$100,000, which the**  
24 **Debtors' acknowledge they have received and such funds are currently**  
25 **on deposit** in an escrow account designated by Debtors ("***Escrow Account***").

26                                   

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27           <sup>4</sup> Terms not otherwise defined in this Section III shall have the meanings ascribed to such terms in the  
28 Bidding Procedures. This summary of the Bidding Procedures terms is meant only as a summary of such terms  
and to the extent there is a conflict between this summary and the terms of the Bidding Procedures, the Bidding  
Procedures shall govern.



- b. The obligation of Buyer to perform under the APA is conditioned on, among other things, the entry of the Bidding Procedures Order by the Bankruptcy Court approving the Bidding Procedures and the Break-Up Fee.

### 3. Auction Process.

- a. Auction Date. The auction shall take place on two Business Days prior to the day scheduled for the hearing on the Sale Motion at the offices of Karr Tuttle Campbell, 1201 Third Ave., #2900, Seattle, Washington 98101, counsel for the Debtors at 10:00 a.m. PST, and noticed to all prospective bidders. To be eligible to participate in the auction, all Qualified Bidders or their designated agent must appear in person at this address.
- b. Qualifications to Bid. Only qualified bidders (as described below) shall be allowed to participate in the auction. Purchaser shall be a Qualified Bidder for all purposes hereunder. To become a “**Qualified Bidder**,” each prospective bidder shall, on or before 5:00 p.m. PST on the Business Day that is Ten (10) Business Days prior to the day scheduled for the hearing on the Sale Motion deliver (i) a good faith deposit in the amount of \$100,000 in cash into the Escrow Account and (ii) a binding letter agreement to George S. Treperinas, Karr Tuttle Campbell, 1201 Third Ave., #2900, Seattle, Washington 98101 (Email: [gtreperinas@karrtuttle.com](mailto:gtreperinas@karrtuttle.com) or [mmunhall@karrtuttle.com](mailto:mmunhall@karrtuttle.com); Fax: (206) 682-7100), counsel for the Debtors, which contains the following:
- (1) **a binding offer to acquire the Acquired Assets for an amount that is at least \$175,000 more than the aggregate value of the Opening Bid** (as defined below) (“**Over Bid**”);
  - (2) evidence to the reasonable satisfaction of the Debtors of such Qualified Bidder’s financial ability to (a) fully and timely perform if it is declared to be the Successful Bidder, and (b) provide adequate assurance of future performance of all contracts to be assigned and any post-closing investments into the Business;
  - (3) disclosure of any connections or agreements with Debtors and/or any officer, director or equity security holder of Debtors; and
  - (4) an agreement to accept and abide by the terms, conditions and procedures set forth herein.

If such bidder contemplates making a bid on terms different than those agreed to by Purchaser in the APA, such bidder shall submit with its letter agreement (a) a detailed description of the differences, and (b) a proposed form of asset purchase agreement marked to show the differences between its proposed asset purchase agreement and the APA; provided that a Qualified Bidder shall not be permitted to vary the terms of the APA in any

1 way that could nullify, modify, impair or otherwise affect the requirements set forth in (1)  
2 through (4) above.

- 3 c. Counsel for the Debtors shall promptly provide copies of any bids that he receives to  
4 the Stalking Horse Bidder and to any Official Creditor Committees appointed in the  
5 Berg Case or in any of the Seller Entities' respective bankruptcy cases. Any party in  
6 interest (including the Stalking Horse Bidder) shall have standing to challenge any  
7 prospective bidder's compliance with these qualification requirements. Any dispute  
8 regarding a prospective bidder's compliance with these qualification requirements  
9 shall be resolved by the Bankruptcy Court.
- 10 d. The Stalking Horse Bid shall be considered the opening bid ("**Opening Bid**") at the  
11 Auction. For all purposes of these bidding procedures and the Auction contemplated  
12 herein, including, without, limitation, the determination of the Successful Bidder, the  
13 Opening Bid shall be valued at an amount equal to the sum of Two Million Seven  
14 Hundred Fifty Thousand Dollars (\$2,750,000) cash at closing.
- 15 e. The highest Over Bid submitted by a Qualified Bidder shall be the initial over-bid at  
16 the Auction ("**Initial Over-Bid**"). **Subsequent over-bids ("**Subsequent Over-****  
17 **Bids**") shall be in increments of not less than \$75,000 higher than the  
18 immediately preceding bid. The Initial Over-Bid and Subsequent Over-Bids shall  
19 be on substantially the same or better terms and conditions, taken as a whole, as those  
20 set forth in the Stalking Horse Bid. In determining the amount of any Subsequent  
21 Over-Bid submitted by the Stalking Horse Bidder, Seller Entities shall take into  
22 account, and the Stalking Horse Bidder shall be entitled to a credit equal to, the  
23 amount of the Break-Up Fee.
- 24 f. All bids shall be made in the presence of other bidders. Seller Entities and Qualified  
25 Bidders shall have the right to request reasonable breaks during the pendency of the  
26 Auction, with which reasonable requests the Seller Entities shall comply.
- 27 g. Upon the conclusion of the bidding, Seller Entities shall announce their determination  
28 as to which bidder has submitted the highest and best bid ("**Successful Bid**"), and  
such bidder shall be declared the successful bidder ("**Successful Bidder**"). The  
Successful Bid, as determined by Seller Entities in accordance with these Bidding  
Procedures, shall be submitted to the Bankruptcy Court for approval at the Sale  
Hearing. Within two (2) business days of the declaration of the Successful Bidder,  
the deposits of all unsuccessful bidders shall be refunded with any accrued interest,  
except as to any bidders ("**Back-up Bidders**") which wish their last bid to remain in  
consideration as a back-up to the Successful Bid ("**Back-up Bids**"). Any party  
wishing to have its last bid considered as a Back-up Bid shall provide the Seller  
Entities with a written request for such treatment no later than one (1) business day of  
Seller Entities' declaration of the Successful Bidder.

- 1           h.     The transaction evidenced by the Successful Bid shall close not later than 30 days  
2               following the entry of the Sale Order (“**Outside Closing Date**”) at which time the  
3               Successful Bidder shall pay the Successful Bid amount less the amount of the deposit  
4               to the Seller Entities on the Closing Date into the Escrow Account; provided,  
5               however, if the Stalking Horse Bidder is declared the Successful Bidder such date  
6               may be extended pursuant to the terms of the APA executed by the Stalking Horse  
7               Bidder.
- 8           i.     The Successful Bidder shall, at its expense, obtain all necessary governmental  
9               licenses, permits and approvals necessary to the consummation of its proposed  
10              transaction (provided, however, that this provision does not change any provision of  
11              the APA or any bid regarding allocation of responsibility to pay taxes of Seller  
12              Entities).
- 13          j.     In the event Purchaser is not the Successful Bidder and Seller consummate an  
14               Alternative Transaction (not including as a result of the due diligence condition being  
15               unsatisfied under Section 8.3 of the APA), Purchaser shall be entitled to receive from  
16               Seller’ bankruptcy estate upon the consummation of such Alternative Transaction a  
17               cash break-up fee payment in the amount of up to \$100,000 of Purchaser’s  
18               reasonable and actual expenses incurred in connection with the proposed transactions  
19               contemplated by the APA (the “**Break-Up Fee**”) as approved by order of the  
20               Bankruptcy Court. The Break-Up Fee shall be paid at the closing of the Alternative  
21               Transaction and shall be paid concurrently or ahead of any other distributions or  
22               payments to any Seller Entities contemplated in connection with such Alternative  
23               Transaction by the Successful Bidder. The Break-Up Fee shall constitute an  
24               administrative expense of Seller Entities under Sections 503(b) and 507(a)(1) of the  
25               Bankruptcy Code. If Purchaser is the Successful Bidder and Purchaser breaches its  
26               obligations under the APA without having its performance excused under the terms  
27               of the APA, it shall not be entitled to receive the Break-Up Fee if a sale of some or all  
28               of the Acquired Assets is closed with another party.
- k.     In the event a bidder is declared to be the Successful Bidder and such bidder fails to  
                  timely perform any of its obligations as set forth above or pursuant to the Bankruptcy  
                  Court approved definitive agreements, such declared Successful Bidder shall forfeit  
                  all deposits made to the extent provided in such definitive agreements or for failure to  
                  enter into such definitive agreement if a bidder other than the Purchaser without  
                  regard to Seller Entities’ ultimate damages occasioned by such failure; such deposits  
                  shall not constitute liquidated damages; and, notwithstanding the foregoing, Seller  
                  Entities and the bankruptcy estates shall retain all rights, remedies, claims,  
                  counterclaims, and defenses, including the right to seek equitable or injunctive relief.  
                  In such an event the Seller Entities shall be free to treat the next highest and best bid  
                  received as the Successful Bid without further Court approval.

- 1           l.       In the event that the Successful Bidder fails to close the transaction for any reason,  
2               Seller Entities shall announce their determination as to which Back-up Bidder has  
3               submitted the highest and best back-up Bid (“**Successful Back-up Bid**”). The party  
4               making the Successful Back-up Bid shall then be deemed the Successful Bidder and  
5               shall close the transaction not later than 30 days following the determination of the  
6               Successful Back-up Bid.
- 7           m.       Seller Entities shall give not less than twenty-four (24) days written notice to all  
8               parties in interest in the Berg Case and their respective bankruptcy cases, including all  
9               Persons which have asserted liens on or security interests in any of the Acquired  
10              Assets, all non-debtor parties to the Assumed Executory Contracts and all known  
11              prospective bidders of the date, time and location of the Sale Hearing, unless the  
12              Bankruptcy Court enters an order allowing the Sale Hearing to proceed on less  
13              notice.
- 14           n.       In the event Seller Entities are unable to obtain Court approval of the Sale Motion,  
15               the sole remedy of any bidder shall be of the return of its deposit except, with respect  
16               to Purchaser, as otherwise provided in the APA with respect to the Break-Up Fee.
- 17           o.       All bids shall be all cash as to amounts payable for the Acquired Assets.

18           The proposed Bidding Procedures are in the best interests of Debtors, their creditors, and  
19           their estates. The Bidding Procedures are designed to strike a balance between inviting competing  
20           bids and enabling Debtors to close a sale with Buyer within a reasonable time frame. The Bidding  
21           Procedures thus are fair, reasonable and necessary to promote the highest and best sale price,  
22           without imposing undue obstacles to the competitive bid process. Moreover, debtors often employ  
23           bidding protections in order to encourage the making of an original offer subject to higher and/or  
24           better offers and ultimately to increase value for the estate.

25           Here, the Break-Up Fee is an integral part of Buyer’s offer. In fact, Buyer’s offer to  
26           purchase the Acquired Assets was – and remains – predicated and conditioned upon, inter alia, this  
27           Court’s approval of the Break-Up Fee. As such, the assurance of the Break-Up Fee has “promoted  
28           more competitive bidding” because it induced a bid from Buyer, which is higher and better than any  
29           other bids received by the Debtors, that otherwise might not have been made. Debtors submit that

1 Buyer should be reasonably reimbursed for its willingness to assume the role of the “stalking horse”  
2 as all parties willing to serve in such role are also requesting break-up fees of similar magnitude.  
3 Moreover, Buyer’s offer (including the Break-Up Fee) is also likely to serve as a catalyst to higher  
4 bids. Accordingly, Debtors respectfully submit that this Court should authorize and approve the  
5 Bidding Procedures, including the Break-Up Fee.  
6

#### 7 **IV. LEGAL ANALYSIS**

##### 8 **1. Conducting a Public Auction Pursuant to the Bidding Procedures Is in the Best** 9 **Interests of the Estate and Its Creditors**

10 By this Motion, Debtors seek approval of the Proposed Asset Sale, free and clear of liens  
11 and encumbrances, as further detailed above and in the APA, subject to higher or better offers.  
12

13 (a) **Bankruptcy Code § 363.** Section 363(b) of the Bankruptcy Code authorizes  
14 a debtor to sell its assets outside of the ordinary course of business. A debtor must show that each  
15 of the following elements has been met: (i) a sound business reason exists for the proposed  
16 transaction; (ii) the sale has been proposed in good faith; (iii) the sale price is fair and reasonable;  
17 and (iv) accurate and reasonable notice has been provided of the transaction.<sup>5</sup> Here, the proposed  
18 sale of the Acquired Assets pursuant to the APA meets each of these four factors.  
19

20 (b) **The Proposed Sale Is Supported by Sound Business Reasons.** Based  
21 upon their analysis of their existing and future business prospects, the Debtors have concluded that,  
22 given their current situation and the absence of a source of capital for investing in long-term  
23 operations, the Proposed Asset Sale represents the only viable way to maximize the value of  
24 Debtors’ estates for the benefit of all creditors.  
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27 <sup>5</sup> *In re Country Manor of Kenton, Inc.*, 172 B.R. 217, 220-21 (Bankr. N.D. Ohio 1994); *In re Stroud*  
28 *Ford, Inc.*, 163 B.R. 730 (Bankr. M.D. Pa. 1993); *In re Plabell Rubber Prods., Inc.*, 149 B.R. 475, 479 (Bankr.  
N.D. Ohio 1992); *In re George Walsh Chevrolet, Inc.*, 118 B.R. 99, 102 (Bankr. E.D. Mo. 1990).

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1       The paramount goal in any proposed sale of property of the estate is to maximize the  
2 proceeds received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc.*, 107 F.3d 558,  
3 564-65 (8th Cir. 1997) (stating that, in bankruptcy sales, “a primary objective of the Code [is] to  
4 enhance the value of the estate at hand”); *In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y.  
5 1992) (“It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and  
6 the Debtors’ duty with respect to such sales is to obtain the highest price or greatest overall benefit  
7 possible for the estate.”). To that end, courts uniformly recognize that procedures intended to  
8 enhance competitive bidding are consistent with the goal of maximizing the value received by the  
9 estate and are appropriate in the context of bankruptcy sales. *See In re Integrated Res., Inc.*, 147  
10 B.R. at 659 (sales procedures should “encourage bidding and maximize the value of the Debtors’  
11 assets”).  
12  
13  
14

15       Here, the proposed Bidding Procedures will allow and encourage interested parties to submit  
16 competing bids in an Auction, thereby maximizing the value that the Debtors will receive for their  
17 assets. The Debtors believe that the Auction process will allow them to determine the highest and  
18 best price possible for their assets. Without a prompt sale, the value of the Debtors as a going  
19 concern will significantly diminish because of the Debtors’ cash flow difficulties.  
20

21       The Debtors further submit that the Proposed Asset Sale will preserve the substantial  
22 goodwill of their businesses, maintain valuable relationships with their customers, preserve jobs, and  
23 avoid a liquidation sale of Debtors’ assets at severely depressed, “fire-sale” prices. Thus, Debtors  
24 believe that the Proposed Asset Sale will realize the most cash possible for Debtors’ estate and  
25 creditors.  
26  
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28

1           (c)     **The Sale has Been Proposed in Good Faith.** “The requirement that a Buyer act in  
2 good faith ... speaks to the integrity of his conduct in the course of the sale proceedings.” *In re*  
3 *Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). “Typically, the  
4 misconduct that would destroy a Buyer’s good faith status at a judicial sale involves fraud, collusion  
5 between the Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of  
6 other bidders.” *Id.*

8           Here, the APA is the result of protracted, arm’s length negotiations between Debtors and  
9 Buyer, and their respective advisors. Buyer thus is a good faith Buyer within the meaning of  
10 Section 363(m) of the Bankruptcy Code and should be entitled to all of the protections thereof.

12           Additionally, the sale of the Acquired Assets is subject to higher or better offers and Debtors  
13 intend to provide notice of the Proposed Asset Sale to all potential bidders as more fully discussed  
14 below. Finally, Debtors have fully disclosed, and are requesting herein the Court’s approval of, all  
15 of the terms and conditions of the Proposed Asset Sale, notice and bidding procedures.  
16 Accordingly, the sale of the Acquired Assets has been proposed, and is, in good faith.

18           (d)     **The Purchase Price is Fair and Reasonable.** Since the appointment of the Trustee  
19 for the Berg Case, and her control of the Debtors, she and her advisors have sought higher or better  
20 offers for the Debtors’ assets. Based upon those efforts, Debtors believe that the Purchase Price is  
21 fair and reasonable, is the highest and best offer received to date for the Acquired Assets, and that  
22 the likely alternative to the Proposed Asset Sale is a forced liquidation, with a resultant loss of  
23 substantial value to the Debtors’ estates.

24           Further, the Debtors submit that the payment of the Break-Up Fee in the event of an  
25 Alternative Transaction is fair and reasonable. Buyer has incurred and will continue to incur costs in  
26  
27  
28

1 continuing to make its offer available to Debtors. If another bidder appears and pays substantially  
2 more than Buyer's offer, the Debtors will reap the benefits of Buyer's first offer allowing for a  
3 higher subsequent offer. Indeed, courts have recognized that such fees are often a key component to  
4 significant sales conducted under section 363 of the Bankruptcy Code. *See In re Integrated Res.,*  
5 *Inc.*, 147 B.R. at 659-60 ("Break-up fees are important tools to encourage bidding and to maximize  
6 the value of the debtor's assets ... In fact, because the ... corporation ha[s] a duty to encourage  
7 bidding, break-up fees can be necessary to discharge [such] duties to maximize values."). Here, the  
8 Break-Up Fee reasonably relates to Buyer's "risk, effort and expenses ...", *In re Integrated Res.,*  
9 *Inc.*, 147 B.R. at 662, was the result of arms-length negotiations, *In re 955 5<sup>th</sup> Avenue Associates,*  
10 96 B.R. 24 (Bankr. S.D.N.Y. 1989) and encourages bidding. *Id.* at 28. Thus, the Break-Up Fee  
11 should be approved and allowed in the event of an Alternative Transaction.  
12  
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14

15 (e) **The Requirements of 11 U.S.C. § 363(f).** Section 363(f) of the Bankruptcy Code  
16 provides:

17 (f) The Trustee may sell property under subsection (b) or (c) of this section free and  
18 clear of any interest in such property of an entity other than the estate, only if –

- 19 (1) applicable non-bankruptcy law permits sale of such property free and clear of  
20 such interest;
- 21 (2) such entity consents;
- 22 (3) such interest is a lien and the price at which such property is to be sold is  
23 greater than the aggregate value of all liens on such property;
- 24 (4) such interest is in bona fide dispute; or
- 25 (5) such entity could be compelled, in a legal or equitable proceeding, to accept a  
26 money satisfaction of such interest.

27 11 U.S.C. § 363(f).  
28



1 First, the Claims Bar Date set for filing proofs of claim in this case has not been set, and as of  
2 this date the aggregate amount of secured claims for all of the Debtors totals under \$750,000. All  
3 approved secured claims will be paid in full out of proceeds from the Proposed Asset Sale. To the  
4 extent that there are additional claims or amounts due and secured by the Acquired Assets, any liens  
5 on such assets shall also attach to the proceeds from the Proposed Asset Sale.

7 Thus, the Debtors submit that the transfer of the Acquired Assets free and clear of any liens,  
8 claims, interests, and encumbrances satisfies the statutory prerequisites of Section 363(f) of the  
9 Bankruptcy Code. Accordingly, Debtors seek the entry of a Sale Order authorizing the sale of the  
10 Acquired Assets pursuant to Section 363.

12 **2. Assumption and Assignment Contracts and Leases Pursuant to 11 U.S.C. § 365**

13 Section 365(a) of the Bankruptcy Code governs assumption of unexpired leases and other  
14 executory contracts and provides that, “[t]he trustee, subject to the court’s approval, may assume or  
15 reject any executory contracts or unexpired lease of Debtor.”

17 **Section 365(f) of the Bankruptcy Code provides, in pertinent part, that:**

18 (2) The trustee may assign an executory contract or unexpired lease of the debtor  
19 only if –

20 (A) the trustee assumes such contract or lease in accordance with the  
21 provisions of this section; and

22 (B) adequate assurance of future performance by the assignee of such  
23 contract or lease is provided, whether or not there has been a default in such a  
24 contract or lease.

25 11 U.S.C. § 365(f)(2).

26 The Debtors’ proposed assumption and assignment of the Assumed Executory Contracts (to  
27 be designated by Buyer and separately noted for hearing) is a proper exercise of Debtors’ business  
28 judgment as part of an integral component of this negotiated Proposed Asset Sale. Moreover the

1 contracts to be assumed will avoid rejection damages that would likely dilute amounts to ultimately  
2 go to the class of unsecured creditors. Additionally, Buyer has represented that it is a competent,  
3 financially stable assignee. Therefore, it is respectfully submitted that Debtors may assume and  
4 assign the Assumed Executory Contracts under Section 365 of the Bankruptcy Code. Debtors plan  
5 to bring a separate motion to assume and reject contracts which shall be conditioned upon closing of  
6 the Proposed Asset Sale, and such motion shall include disclosure of the specific executory contracts  
7 to be assumed.  
8

9  
10 **3. The Successful Bidder Is Entitled to Good Faith Purchaser Status Pursuant to Section**  
11 **363(m) of the Bankruptcy Code.**

12 The Debtors request that the Court find that the Successful Bidder is qualified to acquire the  
13 Acquired Assets and will do so in good faith within the meaning of Bankruptcy Code section  
14 363(m). Specifically, section 363(m) provides that “[t]he reversal or modification on appeal of an  
15 authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect  
16 the validity of a sale or lease under such authorization to an entity that purchased or leased such  
17 property in good faith ....” 11 U.S.C. § 363(m). Thus, pursuant to this section, “an appeal of a  
18 bankruptcy court’s ruling on a foreclosure action [or sale] generally cannot affect the rights of a  
19 good faith purchaser of the foreclosed property.” *Mann v. Alexander Dawson, Inc.*, 907 F.2d 923,  
20 926 (9th Cir. 1990).  
21

22 Here, Buyer needs assurance that the purchase of the Acquired Assets will not be subject to  
23 future attack by objecting creditors, if any. Such assurance, Debtors believe, is required to generate  
24 the maximum purchase price for such assets at the Sale Hearing. Further, these circumstances  
25 warrant a finding of good faith on the part of Buyer. Lack of good faith is generally determined by  
26 the existence of fraudulent conduct or insider dealing during the sale process. *See In re Exennium*,  
27  
28

1 *Inc.*, 715 F.2d 1401 (9th Cir. 1983). Here, no such fraudulent conduct or dealings have occurred as  
2 of the date of this Sale Motion and will not occur prior to the Sale Hearing. Further, the Proposed  
3 Asset Sale here will be the product of an open Auction subject to approval of the Court and to the  
4 extent necessary, arm's-length, good faith negotiations between the Debtors, on the one hand, and  
5 the Successful Bidder, on the other.

7 **V. PROPOSED NOTICE OF PROPOSED ASSET SALE AND PROCEDURES**

8 In order to assure broad dissemination of notice of the Proposed Asset Sale, the Sale  
9 Hearing, and the Bidding Procedures, upon entry of the Bidding Procedures Order, Debtors propose  
10 to serve (a) the Bidding Procedures Order and the proposed notice of sale ("*Notice of Sale*")  
11 attached hereto as Exhibit B on all creditors, equity holders and prospective bidders (or their  
12 counsel) that are known to the Debtors and their advisors and (b) the Notice of Sale and the Sale  
13 Motion on (i) the Office of the United States Trustee; (ii) counsel to the Official Committee of  
14 Unsecured Creditors (if any); (iii) the local, state and federal taxing authorities for each jurisdiction  
15 in which the Acquired Assets are located; (iv) counsel to the Buyer; (v) all parties known to the  
16 Debtors to have or to assert any lien, claim, Encumbrance or other interest in any of the Acquired  
17 Assets; (vi) the Office of the United States Attorney; (vii) the Attorney General for the State of  
18 Washington; and (viii) all persons who have filed requests for notice in these chapter 11 cases.

19 The Debtors respectfully submit that such notice of the sale of the Acquired Assets satisfies  
20 the notice requirements of the applicable Bankruptcy Rules and § 363(b) of the Bankruptcy Code,  
21 constitutes good and sufficient notice, and that no other or further notice of this Motion, the  
22 Proposed Asset Sale, and the APA is required.

23 **VI. CONCLUSION**

1 Based on the foregoing, the Debtors respectfully request that this Court (i) at the conclusion  
2 of the initial hearing on the Sale Motion, (a) enter the Bidding Procedures Order substantially in the  
3 form filed concurrently herewith, and (b) approve the forms of the Sale/Bidding Procedures and the  
4 Notice of Sale attached as exhibits to the Bidding Procedures Order; (ii) at the conclusion of the  
5 Sale Hearing, enter the Sale Order substantially in the form attached hereto as Exhibit B; and (iii)  
6 grant such additional relief as requested herein.  
7

8 DATED this 3<sup>rd</sup> day of December, 2010.  
9

10 KARR TUTTLE CAMPBELL  
11

12 By: /s/ George S. Treperinas  
13 George S. Treperinas, WSBA #15434  
14 Stephen S. McKay, WSBA #42046  
15 Attorneys for Debtors  
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